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No. 99-929

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

REBECCA McDOWELL COOK,
Petitioner,
v.
DONALD J. GRALIKE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I.

Do the people violate Article V of the Constitution when they participate in the evolution of their government by communicating their opinion to federal legislators or by commenting on the ballot to themselves about the behavior of federal legislative candidates?

II.

Do the people violate the Qualifications Clauses and the First Amendment when they comment on the ballot regarding their elected representative's actions and voting record or when they comment on the ballot about a non-incumbent congressional candidate's silence concerning a prospective constitutional amendment?

III.

Does the Speech and Debate Clause of the Constitution prohibit the people from commenting on the ballot about their federal legislator's actions and voting record in regard to a prospective constitutional amendment?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption except Michael Harmon, the 1998 Libertarian Party candidate for Missouri's Seventh Congressional District, who intervened as an appellee in the United States Court of Appeals for the Eighth Circuit after Donald Gralike withdrew as a candidate for the House of Representatives.

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OPINIONS BELOW

The opinion of the court of appeals (Petition Appendix ["P.A."] A1-35), entered on August 31, 1999, is reported at 191 F.3d 911. The opinion of the district court granting Gralike summary judgment (P.A. A27-35) is reported at 996 F.Supp. 917 (W.D. Mo. 1998); the two district court orders denying petitioner's motions to dismiss (P.A. A36-81) are not reported.

JURISDICTION

The court of appeals entered its judgment on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1993) and pursuant to Supreme Court Rule 14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are Article I, Section 2, Clause 2; Article I, Section 3, Clause 3; Article I, Section 4, Clause 1; Article I, Section 6, Clause 1; Article V; and Amendment I. The provisions of the Missouri Constitution involved in this case are Article VIII, Sections 15-22. These provisions are set forth in the petition for writ of certiorari. Cert. Pet. 2-8.

STATEMENT OF THE CASE

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) (*Thornton*), this Court informed the people of the various states that the only way to enact term limits for members of Congress was by amending the Constitution. The citizens of Missouri took this admonition to heart. Thus, on November 5, 1996, they approved an initiative measure amending Article VIII of the Missouri Constitution to add sections 15 through 22.[1]

In sections 15 and 16, the people of Missouri responded to the Court's instructions in *Thornton* by declaring their

[1] For convenience, petitioner will refer to Article VIII, sections 15 through 22 collectively as "Article VIII."

intention to support the adoption of a particular amendment to the United States Constitution placing limits on the number of terms which an individual could serve in Congress. In section 17, clause 1, the voters instructed the members of Missouri's congressional delegation to use their powers to pass the congressional term limits amendment included in section 16. The people provided that any member of Congress who failed to engage in eight specified behaviors during the term preceding the election would have the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" printed next to his or her name on the next primary and general election ballots. Art. VIII, § 17(2)(a-g).

In section 18, the people offered all non-incumbent candidates for Congress the opportunity to pledge support for the term limits amendment set forth in section 16. The pledge was not mandatory, and a non-incumbent candidate's silence in the face of the opportunity to take the pledge would not prevent the candidate from being on the ballot. Rather, if a candidate responded to the opportunity with silence or affirmative declination, the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" would be printed adjacent to the candidate's name on the primary and general election ballots.

The remaining provisions were procedures for the proper implementation of Article VIII. In section 19, the people gave Missouri's Secretary of State the ministerial task of informing the people about a candidate's behavior. Section 20 authorized an automatic repeal of sections 15-22, when the congressional term limits amendment in section 16 became a part of the United States Constitution. Section 21 granted the Missouri Supreme Court original jurisdiction to hear challenges to Article VIII. And section 22 contained a severability clause

which, in the event any provision of Article VIII was found to be unconstitutional, would sever the unconstitutional provision from the remainder of the amended Article.

A scant thirty-five days after the populace expressed its will, Donald Gralike, at the time an undeclared, non-incumbent candidate for the United States House of Representatives, filed suit under 42 U.S.C. § 1983 in the United States District Court for the Western District of Missouri challenging the constitutionality of the people's actions. Joint Appendix ("J.A.") 3-14 . Gralike named as the defendant the Missouri Secretary of State, Rebecca McDowell Cook, in her official capacity. J.A. 3, 4. He claimed Article VIII: (1) added qualifications for service in Congress in violation of the Qualifications Clauses; (2) was unconstitutionally vague; (3) violated the Supremacy Clause; (4) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment; and (5) deprived him of his First Amendment rights. J.A. 7-14.

After denying most of petitioner's two motions to dismiss[2] (P.A. A36-81), the district court granted Gralike summary judgment on February 18, 1998. P.A. A35. The court concluded that Article VIII: (1) added qualifications for service in Congress in violation of the Qualifications Clauses by commenting on a congressional candidate's behavior; (2) violated the First Amendment right to free speech of candidates for Congress by commenting on their statements, actions, or silence; and (3) usurped Congress's Article V power to amend

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[2] The district court, on Eleventh Amendment grounds, dismissed Gralike's additional claim that Article VIII violated the Missouri Constitution. P.A. A75-77 & 81. Gralike did not appeal.

the Constitution by allowing the people to propose a constitutional amendment. P.A. A27-35. Cook filed a timely notice of appeal.

On August 31, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the district court. The majority agreed with the district court and concluded that Article VIII: (1) added qualifications for members of Congress in violation of the Qualifications Clauses by commenting on the behavior of congressional candidates; (2) violated the First Amendment right to free speech of congressional candidates by commenting on their statements, actions, or silence; and (3) usurped Congress's Article V power to amend the Constitution by allowing the people to propose a constitutional amendment. P.A. A1-23. The court of appeals also reached an issue not raised by either party: it determined that Article VIII violated the Speech and Debate Clause of the Constitution by allowing the citizenry to comment on the official acts of members of Congress. P.A. A14-15.

Circuit Judge Hansen concurred in part and dissented in part from the majority's holding. He concurred in the holding as to the labeling provisions in Article VIII, sections 17, 18 and 19. But he would have left the remaining portions of Article VIII untouched, similar to an earlier decision by another Eighth Circuit panel in *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999). Judge Hansen observed that sections 15 and 16 were only advisory, and thus constitutionally sound. Judge Hansen "believe[d] the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I." P.A. A24. The judge continued:

In fact, "We the People" have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment procedures set out in Article V. However, the people play a crucial, substantive role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures.

P.A. A24-25.

Petitioner filed a Petition for Writ of Certiorari in this Court seeking to correct the decisions of the district and circuit courts. On April 17, 2000, this Court granted the petition. J.A. 2.

SUMMARY OF ARGUMENT

On November 5, 1996, the people of Missouri declared that it was time to amend the United States Constitution. The people spoke by approving an initiative petition placing an "instruct and inform" provision in the Missouri Constitution. But the United States Court of Appeals for the Eighth Circuit nullified the action of the citizens of Missouri, determining that the United States Constitution forbids citizens from advising their elected officials about the need to propose and ratify a particular constitutional amendment. This ruling was in error

because the Constitution does not deprive the people of the right to participate in their government; it preserves it.

The Eighth Circuit held that the people's instruction – and their plan to inform each other regarding their congressional delegation's compliance with the instruction – violated Article V of the Constitution. But Article V does not prevent the people from participating in the development of their own government. In fact, citizen instructions were common both before and after the adoption of the Constitution. The people's instruction does not subvert the mechanisms of Article V. Missouri's congressional delegation will perform all the functions set out in Article V; they will simply do so with an awareness of the people's wishes.

Despite the circuit court's holding to the contrary, Missouri's Article VIII does not create an additional qualification for service in Congress. In *Thornton* the Court developed a two-part test to determine whether a law created an additional qualification for congressional service. An un-constitutional additional qualification is created by a law that disqualifies a class of candidates *and* has the sole purpose of indirectly creating an additional qualification. 514 U.S. at 835-36, n. 48. Article VIII does neither. That some voter "might," in the opinion of the Eighth Circuit, be affected by ballot information does not create a constitutionally impermissible handicap. Nor did the people intend solely to create an additional qualification for service in Congress by passing Article VIII. Instead, they simply intended to comply with the Court's directive in *Thornton* and promote the amendment of the Constitution. Nothing in the people's enactment violated the Qualifications Clauses.

The Eighth Circuit also held that Missouri's Article VIII violated the First Amendment by compelling the speech of congressional candidates. But the Article compels nothing. Instead, it merely provides for comment by the citizens on the behavior of their congressional candidates – an exercise of the people's First Amendment rights. The Eighth Circuit never considered this right of the people. Nor did it bother to balance the people's rights against those of the candidates. Though such a balance is unnecessary because Article VIII compels nothing, the people's fundamental interest in preserving their voice in government outweighs any slight effect Article VIII may have on the free speech rights of candidates for Congress.

Further, Article VIII does not violate the Speech and Debate Clause. The Eighth Circuit said that the Clause deprives the people of the right to comment on the ballot about the behavior of their elected officials. But the Speech and Debate Clause does not rob the people of that right; it merely protects members of Congress from "intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel v. United States*, 408 U.S. 606, 616 (1972). Article VIII does not involve material executive action nor could it prompt impermissible prosecution.

Erroneous decisions, such as the Eighth Circuit's, interfere with the public's right to communicate about the electoral process, frustrate the public will, and undermine America's social contract that provides for the citizenry to determine the form of their government. No provision of the Constitution mandated the Eighth Circuit's interference with the public's right to speak. Unless this Court corrects the circuit court's error, the meaning of various provisions of the

Constitution will continue to be perverted and the people will be further estranged from the government they once ordained. This Court should restore to the people their right to fully participate in their own government.

ARGUMENT

I. Nothing in the history, text, or spirit of Article V prohibits the people from participating in the evolution of their government by communicating their opinion on a prospective amendment to congressional candidates or by commenting on the ballot about the behavior of these candidates.

In drafting the Constitution, the Framers recognized that perfection was unattainable. The need for useful alterations to the Constitution "could not but be foreseen."[3] Thus, the Framers rejected the French idea of an immutable constitution and incorporated a method for amendment into the document[4]:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case,

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[3] *The Federalist No. 43*, at 278-79 (James Madison) (Clinton Rossiter ed., 1961).

[4] *See* Alexis De Tocqueville, *Democracy in America* 101 (J.P. Mayer ed. & George Lawrence trans., 1969) (comparison of the French and American Constitutions).

> shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. Const. art. V. By its opinion, the Eighth Circuit robbed the people of the opportunity to comment on this process. And the court did so without properly considering the history, text, and spirit of Article V.

A. American history is replete with examples of citizens instructing their legislators.

Since the founding of our country, the people have exercised their right to instruct their elected officials. Missourians continued this tradition by passing Article VIII. And prior to the recent spate of rulings,[5] of which the Eighth Circuit's opinion is but one example, no court had ever found this expressive conduct to be unconstitutional.

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[5] *See Barker v. Hazeltine*, 3 F. Supp. 2d 1088 (D. S.D. 1998); *League of Women Voters of Maine v. Gwadosky*, 966 F. Supp. 52 (D. Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998) and *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996) (all invalidating instruct and inform provisions on Article V and various othergrounds). *But see Simpson v. Cenarrusa*, 944 P.2d 1372 (Idaho 1997) (instruct provision did not violate Article V); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999) (instruct provision does not violate Article V); and *Kimble v. Swackhamer*, 439 U.S. 1385 (1978) (Article V does not prohibit citizens from advising their legislators on a prospective constitutional amendment).

1. Early examples of citizen instruction.

From the earliest days of our country, the people have exercised their right to influence the form of their government. The delegates to the Second Continental Congress from North Carolina, Virginia, New Jersey, and New York were all under instructions to vote for independence.[6] In fact, the delegates from New York considered their instructions to be so important that they read them aloud before the Continental Congress.[7]

The instructed delegates enshrined the right of the citizenry to direct the form of their government in the Declaration of Independence.

> We hold these truths to be self evident, . . . That whenever any Form of Government becomes destructive of these ends *it is the Right of the People to alter or to abolish it*, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

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[6] *See Independence in North Carolina* (April 12, 1776), reprinted in 5 *American Archives, Fourth Series* 859, 859 (Peter Force ed., 1844); *Records of the Virginia Convention* (May 15, 1776), reprinted in 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force, ed., 1846); *Records of the New York Provincial Congress*, reprinted in 6 *American Archives, Fourth Series* 1364, 1364 (Peter Force, ed., 1846); all cited in Kris W. Kobach, *May "We The People" Speak?: The Forgotten Role of Constituent Instructions in Amending The Constitution*, 33 U.C. Davis L. Rev. 1, 38-41, 46 (1999) (hereafter Kobach).

[7] Kobach, 33 U.C. Davis L. Rev. at 46.

The Declaration of Independence, para. 2 (U.S. 1776) (emphasis added).

The tradition of citizen instructions continued into the Constitutional Convention. In fact, several Framers were acting pursuant to instructions when they drafted the Constitution. For example, Delaware's delegates were acting under specific instructions to preserve the Fifth Article of the Articles of Confederation that provided each state would receive a single vote in Congress.[8]

The statements of the Framers also indicate that they understood the people possess the right to instruct their members of Congress. As the states considered ratification of the Constitution, the delegates to the Convention reaffirmed the continued availability of the instruction tool. Thus, in reference to a possible future increase in the size of Congress, Alexander Hamilton commented:

> If the general voice of the people be for an increase, it must undoubtedly take place. *They have it in their power to instruct their representatives*; and the State Legislators, which appoint the Senators, may enjoin it also upon them.[9]

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[8] 3 *The Records of the Federal Convention of 1787* 574-75 (Max Farrand ed., 1966) *cited in* Kobach, 33 U.C. Davis L. Rev. at 56.

[9] Alexander Hamilton, Statement before the New York Ratifying Convention (June 23, 1788), *reprinted in* 2 *Elliot's Debates*, at 252 (Jonathon Elliot ed., 1836) (emphasis added). In their own constitutions, three states heeded Hamilton's statements and their constitutions explicitly guaranteed the right to instruct their representatives. Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution*, at 111 (1990). In the other states, "the right [to instruct] was assumed." *Id.*

Additionally, in reference to the amendment process itself, John Dickinson, a constitutional convention delegate from Delaware, stated:

> For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations [to the Constitution] respectively required by them, and to enjoin their representatives, to employ every proper method to obtain ratification.[10]

The use of citizen instructions continued unabated after the Constitution, containing Article V, was ratified. Several states instructed their representatives to the first Congress. Members of Congress from Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina arrived bearing instructions as to their vote on the Bill of Rights.[11] And in the wake of *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the legislatures of Massachusetts, Virginia, Connecticut, and North Carolina instructed their Senators to seek a constitutional amendment (now the Eleventh Amendment) that would deny federal courts jurisdiction over suits by citizens against states.[12]

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[10] John Dickinson, *The Letters of Fabius, Pamphlet No. VII* (1797), *reprinted in Friends of the Constitution: Writings of the "Other" Federalists 1787-1788*, at 496 (Colleen A. Sheehan and Gary L. McDowell eds., 1998).

[11] Kobach, 33 U.C. Davis L. Rev. at 63.

[12] Kobach, 33 U.C. Davis L. Rev. at 70.

Hence, within a few short years of Article V's enactment, at least eight of the original thirteen states had instructed their legislators with regard to various constitutional amendments. Certainly Article V was not thought to prohibit instructions to federal legislators regarding proposed constitutional amendments.[13]

2. Post-Civil War examples of citizen instruct and inform provisions.

This tradition of citizen instruction continued on into the Twentieth Century. For example, prior to the passage of the Seventeenth Amendment, there was much popular resentment against the system of legislatively-elected Senators.[14] Senators were perceived as tools of corporations and the party leadership.[15] To correct these problems, various states requested Congress to propose a constitutional amendment. Not surprisingly, the Senate steadfastly refused to approve such

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[13] While the early history regarding provisions to inform the electorate of their representatives' behavior in response to citizen instructions is not well developed, the reason for this lack of development is readily apparent. At the time of the Framers, no self-respecting member of Congress would remain in Congress after ignoring the public's instructions. Instead, they would simply retire on their own, thus eliminating any need for an inform provision. In fact, two future presidents, John Quincy Adams and John Tyler, actually did retire from the Senate after ignoring instructions. Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?*, at 123 (1993).

[14] David E. Kyvig, *Explicit and Authentic Acts, Amending the U.S. Constitution*, 1776 - 1995, at 209 (1996) (hereafter Kyvig).

[15] *Id.*

an amendment.[16]

Stymied in their initial attempts to amend the Constitution, the people of the various states adopted different techniques to effectuate the direct election of senators. For example, in 1904, the people of Oregon, by initiative measure, adopted a system that essentially simulated the direct election of Senators.[17] First the voters, via a primary election, would select their party's senatorial candidate.[18] Then the two candidates would face off in a general election.[19] These elections were not binding. Rather, pursuant to Article I, § 3, cl. 1 of the Constitution, the Oregon Legislature possessed the authority to select the state's Senators. Accordingly, by law, the people required their legislators to sign a pledge agreeing to comply with or a pledge indicating their freedom to reject the people's wishes.[20] Most legislators agreed to support the popular preference, and the deadlock that plagued previous senatorial elections was avoided. In fact, in 1909, the effectiveness of the Oregon system was demonstrated when the state's Republican- controlled legislature quickly selected the people's choice, a Democrat, for the United States Senate.[21]

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[16] *See* Ronald D. Rotunda, *The Aftermath of Thornton*, 13 Const. Comment. 201, 206-207 (1996) (hereafter Rotunda).

[17] Rotunda, 13 Const. Comment. at 208.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Kyvig, *supra* note 14, at 210.

Oregon was not the only state to develop an alternative method for the selection of Senators. Nebraska pioneered an "instruct and inform" system similar to the one at issue here.[22] In Nebraska, the people also voted on who they wanted to be their Senator. But Nebraska took this system one step further: it printed the results of the pledges on the ballot right next to a candidate's name.[23] Thus, after each candidate's name the ballot either stated, "Promises to vote for the people's choice for United States Senator," or "Will not promise to vote for the people's choice for United States Senator."[24]

Other states followed Oregon's and Nebraska's lead. In 1910, three years before the Seventeenth Amendment was passed, fourteen of the thirty Senators who were to be selected by state legislatures were known in advance because the legislatures had bound themselves to select the senatorial candidates endorsed by popular vote.[25] By 1912, nearly sixty percent of the Senate was selected by the near equivalent of a direct election.[26]

While citizen instructions saw their modern heyday during the debate about the direct election of Senators, passage

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[22] *See* Vikram D. Amar, *The People Made Me Do It: Can the People of the State Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1069 (2000) (hereafter Amar).

[23] Rotunda, 13 Const. Comment. at 209.

[24] *Id.*

[25] *See* Rotunda, 13 Const. Comment. at 209.

[26] *Id.*; Amar, 41 Wm. & Mary L. Rev. at 1070.

of the Seventeenth Amendment did not bring an end to citizen instructions. In 1928, the voters of Massachusetts, by initiative, instructed their state senators to vote for repeal the Eighteenth Amendment.[27] And in 1933, Oregon held a statewide referendum to determine how the state's delegates to the statewide convention[28] should vote on the ratification of the Twenty-First Amendment. The people voted in favor of ratification and, seventeen days later, the state convention ratified the Twenty-First Amendment.[29]

By passing Article VIII, the people of Missouri continued a noble tradition of citizen involvement in their country's political future. The Eighth Circuit ignored this tradition. *See Gralike*, 191 F.3d at 924-25 (P.A. A19-22). In fact, the court of appeals never even discussed the history of citizen instructions. Rather, it merely misapplied this Court's opinions in *Hawke v. Smith* and *Leser v. Garnett*.

B. Because they are merely advisory, the people's actions do not run afoul of either *Hawke* or *Leser*.

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[27] *See* 1929 *Mass. Acts* 544-52 (tallying votes of senatorial districts); Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, at 476-77 (1930); *both cited in* Kobach, 33 U.C. Davis L. Rev. at 82-83.

[28] The Twenty-First Amendment, unlike any other amendment to the Constitution, was sent to state-wide conventions, not state legislators, for approval. Kobach, 33 U.C. Davis L. Rev. at 86.

[29] 1933 Oregon Laws, 2d Special Sess. 10 (1933); *cited in* Kobach, 33 U.C. Davis L. Rev. at 86-87.

In striking down Article VIII, the Eighth Circuit relied extensively on *Hawke v. Smith*, 253 U.S. 221 (1920) and *Leser v. Garnett*, 258 U.S. 130 (1922). In *Hawke*, the Court struck down on Article V grounds a provision of the Ohio Constitution that gave the people final authority to approve or reject an amendment to the United States Constitution. 253 U.S. 221. In *Leser*, the Court again held that the actual power to ratify an amendment may not be altered by the people of a state. 258 U.S. at 137. Neither *Hawke* nor *Leser* deprives the people of the right to participate in their governance by instructing their legislators and informing themselves of their legislators' performance.

Hawke and *Leser* deal with a direct attempt to supplant the legislature in the ratification process. Missouri's Article VIII does no such thing. It merely informs the Missouri congressional delegation of their constituents' wishes. It is still the Senators and Representatives who will actually propose the amendment and cast the vote. Accordingly, Missouri's Article VIII in no way alters the process established by Article V. And thus, it does not run afoul of *Hawke* and *Leser*.[30]

The Eighth Circuit's narrow interpretation of Article V and its application of *Hawke* and *Leser* do not follow from the text of the Constitution. The court of appeals stated that an

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[30] For a more extensive discussion of why citizen instructions do not run afoul of *Hawke* and *Leser*, *see* Amar, 41 Wm. & Mary L. Rev. at 1075-83 (Professor Amar demonstrates that *Leser* actually narrows the holding in *Hawke*, and that the exigencies of the situation around the *Hawke* decision compelled the result). *Compare* Michael S. Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 731 (1993) (Professor Paulsen contends that *Hawke* was simply wrongly decided).

attempt by the people to "directly influence" the amendment process violated Article V because the article "delegates the amendment process to legislative bodies, not voters."[31] *Gralike*, 191 F.3d at 924-25 (P.A. A19-22). Concededly, the text of Article V does assign the functions of amendment enactment to legislative bodies, but at no point does it protect members of these bodies from learning the will of their constituents, nor from having their constituents learn of their actions. Instead, Article V simply provides that legislative bodies will ultimately perform the amendment procedures.

Under Missouri's Article VIII, Senators and Representatives will continue to perform all the functions related to the amendment process. They will just do so with an awareness of the people's wishes. As Chief Justice (then Justice) Rehnquist recognized in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), that does not violate *Hawke*, *Leser*, or the text of Article V. The Chief Justice held that it was constitutional for the citizens of Nevada, by way of a referendum vote, to advise their legislators how to vote on the Equal Rights Amendment. 439 U.S. at 1385-88. He wrote, "I would be most disinclined to read either *Hawke*, . . . *Leser* . . . or Art. V as ruling out communication between members of the legislature and their constituents." *Id.* at 1387-88. Despite the citizen's referendum, the legislators could still vote as they saw fit; thus, the referendum was non-binding. *Id.*

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[31] The Eighth Circuit's argument that Article V is exclusive is also unpersuasive in light of Court precedent. For example, Article V makes no provision for time limits on the ratification of amendments. So, according to the Eighth Circuit's logic of exclusivity, no such limitation is allowed. But in *Dillon v. Glass*, 256 U.S. 368, 375-76 (1921), this Court held that Congress may place a time limitation on ratification. Thus, implicitly, the Court held that Article V is not exclusive.

at 1387. *See also Miller*, 169 F.3d at 1126 and *Gralike*, 191 F.3d at 926-28 (P.A. A23-26) (Hanson, J., dissenting) (citizens can constitutionally express their opinions on prospective constitutional amendments by way of initiative petitions).

The Eighth Circuit attempted to distinguish *Kimble* from the present case by asserting that Missouri's Article VIII is "far more" than the non-binding referendum found in *Kimble*. *Gralike*, 191 F.3d at 925 (P.A. A21). This bare declaration is not a substitute for applying the principles articulated in *Kimble*. According to the Chief Justice, only those matters that change the actual process set out in Article V are of constitutional significance. That the Nevada legislature was likely to delay a vote on the amendment until after the non-binding referendum did not alter the constitutional process and was "not a constitutionally cognizable grievance." 439 U.S. at 1387. Not surprisingly, following the referendum, the Nevada legislature acted as the voters urged. But responsiveness to the people's wishes does not demonstrate a constitutional violation; it is simple democracy.

Like the referendum in *Kimble*, Missouri's Article VIII does not run afoul of Article V because it does nothing to change the Article V amendment process. It merely advises Missouri's congressional delegation of the people's wishes and the people of the candidates' behavior. To the extent that the Eighth Circuit gave any substantive basis for distinguishing *Kimble*, it was by a conclusory determination that Article VIII bound legislators to vote in favor of a constitutional amendment. *Gralike*, 191 F.3d at 925 (P.A. A21-22). In reaching this determination, the Eighth Circuit made two unsubstantiated assumptions: one, that the ballot information would operate as a handicap on candidates; and two, that

candidates would ignore their own principled opinion to avoid the supposedly coercive impact of the ballot information. Such assumptions are not just unproven,[32] they are false; and they should play no role in our constitutional jurisprudence.

The only evidence in the record as to coercion is the result of the 1996 election. But the fact that 57% of Missouri's electorate favored the term limits proposal at the 1996 election does not turn the ballot information into a penalty. The voters in subsequent years might have a different political view. In the twenty-eight counties that failed to support the amendment of Article VIII,[33] a statement on the ballot that a candidate failed to perform in accordance with the measure could be a benefit. Gralike simply offered no evidence on the effect of the ballot label.

In the absence of such evidence, the Eighth Circuit simply assumed the ballot information was a penalty. But truthful words cannot properly be considered a penalty when their supposed penal nature is entirely dependent on the changing opinions of the electorate. For example, in many locales it is reasonable to assume a particular party designation may have the "likely effect" of handicapping a candidate, but it has never been argued that it is unconstitutional to require party

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[32] And this absence of proof is dispositive, for respondent bore the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (on a motion for summary judgment, movant bears the burden of establishing the absence of a genuine issue of material fact).

[33] *See Official Manual of the State of Missouri 1997-1998*, p. 591 (Jim Grebing ed. 1997).

candidates to run with their party designations on the ballot.[34] Neither Gralike nor the Eighth Circuit demonstrated or explained a difference of constitutional significance between compulsory party designations and the ballot information Missourians now seek to put on the ballot.

The Eighth Circuit's second assumption, unstated but implicit and necessary to find Article VIII unconstitutionally binding, is far more troublesome. No judge charged with the obligation to preserve the Constitution should assume that members of Congress are craven office-seekers who will disregard their principles and the constitutional significance of their behavior, voting only for constitutional enactments they perceive will enhance their likelihood of re-election. Instead, judges should maintain at least some modicum of respect for their co-equal branches of government.

This is especially true in this case because available evidence demonstrates the falsity of the Eighth Circuit's assumption. Representative Jo Ann Emerson from Missouri's Eighth Congressional District announced on the floor of the House that she would depart from the instructions of her constituents. Article VIII instructed Emerson to vote against any term limits proposal that permitted members of the House to serve more than six years. But she declared that she "w[ould] vote in favor of each and every serious term limits

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[34] In rejecting an assertion that party labels mislead voters, the Court stated that "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986). Article VIII does nothing more.

proposal brought before the House," not just the one set forth in Article VIII.[35] As a result Emerson was willing to risk the placement of ballot information next to her name. Mo. Const. art. VIII, § 17, cl. 2(f). She either did not consider the ballot information a significant handicap or thought it appropriate to be led by her convictions in the significant arena of constitutional amendments.

The Eighth Circuit's assumptions were false. Article VIII is by its terms non-binding and it does not alter the process established by Article V. While it does advise the members of Congress how the people want them to vote, they "may vote for or against ratification, or refrain from voting on ratification at all, without regard to the [people's instruction]." *Kimble*, 439 U.S. at 1387. Thus, the people of Missouri did not violate Article V by instructing their Senators and Representatives and informing themselves of their actions.

C. In other contexts, the Court has found the instruction of otherwise independent legislators and delegates to be constitutional.

This Court never ruled on the constitutionality of the legislative instructions that perhaps provide the best modern analogy to those at issue here, *i.e.*, those used prior to the passage of the Seventeenth Amendment. But the Court has held that instructions are constitutional in another context: the selection of delegates to the electoral college. U.S. Const. amend. XII.

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[35] Statement 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson).

The Constitution makes no mention at all of the people in reference to the election of the president. Nor does the Constitution state that the discretion of the electors should be inhibited in anyway.[36] Yet, the Court has indicated that this seeming independence is by no means total. *Ray v. Blair*, 343 U.S. 214 (1952). In *Ray*, the Court held that it was constitutionally appropriate for a political party to require a delegate to the electoral college to swear an oath to support the party's candidate, and to exclude anyone from being a delegate who refused to swear the oath. The Court reached this conclusion despite the fact that the Twelfth Amendment does not make any provision for inhibiting the judgment of the electors. Blair, the excluded elector, asserted that the pledge was unconstitutional, using an argument strikingly similar to that accepted by the Eighth Circuit:

> The intention of the Founders was that those electors should exercise their judgment in voting for President and Vice-President. Therefore this requirement of a pledge is a restriction in substance, if not in form, that interferes with the performance of this constitutional duty to select the proper persons to head the Nation, according to the best judgment of the elector.

Id. at 225. The Court rejected this argument, and held that it was constitutional to inhibit the judgment of electors by requiring them to pledge to support the party's candidate. *Id.* at 228-31.

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[36] There is one exception to this unfettered discretion, but it is irrelevant to the present case. Electors, who must vote for a president and for a vice president, must cast one of those votes for someone not a resident of the elector's home state. U.S. Const. amend. XII.

Similarly, instructions under Article V should present no constitutional problem. Article V, like the Twelfth Amendment, does not specifically allow the people to instruct their officials. But as the Court implicitly recognized in *Ray*, the Constitution is not exclusive when it comes to the right of the people to instruct. In light of the history of our country, the people enjoy this right in the absence of its specific denial.[37]

II. The people of Missouri did not create a new qualification for service in Congress by merely commenting on the behavior of congressional candidates.

In striking down Missouri's Article VIII, the Eighth Circuit held that allowing the people to publicly comment on a congressional candidate's behavior violated the Qualifications Clauses. *Gralike*, 191 F.3d at 922-24 (P.A. A15-19). While the circuit court chose the right test (191 F.3d at 923; P.A. A17), it applied the test incorrectly – relying on subjective assumptions not supported by any evidence in the record.

The United States Constitution restricts who may appear

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[37] To the extent there is any question of where the people derive such a right to advise their Senators and Representatives, it may be found in the Ninth and Tenth Amendments. *See* U.S. Const. amend. IX (the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.) and U.S. Const. amend. X (the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people). At no point in the Constitution are the people expressly deprived of the right to advise their Senators and Representatives. Thus, pursuant to the Tenth Amendment, this right is reserved to the people.

on a ballot as a candidate for the House and Senate through the Qualifications Clauses. U.S. Const., art. I, §§ 2 & 3. The restrictions found in the Qualifications Clauses are fixed and exclusive. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 798 (1995). No one suggests that Missouri has directly imposed an additional qualification on service in Congress. All Missourians over the age of twenty-five who have been citizens for more than seven years may still appear on the ballot and be elected to the House of Representatives. All Missourians over the age of thirty who have been citizens for more than nine years may still appear on the ballot and be elected to the United States Senate.

Gralike's argument and the Eighth Circuit's holding are based instead on the doctrine articulated in *Thornton,* 514 U.S. at 835-36, that states cannot indirectly impose qualifications they could not impose directly. This doctrine cannot mean that a state is barred from taking any steps that might affect the ability of a particular candidate to appear on the ballot or be elected. *Id.* at 834-35. Thus, this Court held that a state crosses the constitutional line only when its law both disqualifies a class of candidates *and* has the sole purpose of indirectly creating additional qualifications. *Id.* at 835-36, n. 48 (*citing Clements v. Fashing*, 457 U.S. 957 (1982)). *See also Gralike,* 191 F.3d at 923. (P.A. A17) (recognizing this test). Article VIII does neither.

As to the electoral injury requirement, the Eighth Circuit simply assumed that having the phrase "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" appear by a candidate's name would have the "likely effect" of handicapping the candidate. Compare the dearth of evidence in the record here with the Court's discussion of the evidence in

Thornton. Arkansas would have prevented some candidate names from even appearing on the ballot – a step the evidence available to the Court clearly demonstrated was tantamount, for most candidates, to disqualification. *Thornton,* 514 U.S. at 830-31, nn. 43 & 45. In stark contrast, the Eighth Circuit neither cited nor had before it any evidence of electoral injury. And the mere fact that some voter "might," in the opinion of the Eighth Circuit, be affected by such language does not create a constitutionally impermissible handicap.[38]

As to the second part of the *Thornton* test, the people of Missouri did not solely intend to create an additional qualification for service in Congress when they passed Article VIII. Rather, Article VIII, section 15, specifically states that the people's intention is to secure an amendment to the Constitution. Despite this, the Eighth Circuit concluded that the intent of people of Missouri was to add an additional qualification for service in Congress. *Gralike*, 191 F.3d at 923-24 (P.A. A18-19).

The Eighth Circuit apparently believes Article VIII violates the Qualifications Clauses because the amendment the people seek would add a limitation on congressional service. *Id.* This argument goes too far. It would place a bar on public support for any amendment to the Qualifications Clauses,

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[38] There are numerous items that presently appear on a ballot that might effect a voter's decisions, and the Court has never held them to be unconstitutional. For example, the placement of candidate's party affiliation on the ballot "might" effect a voter's decision. In fact, in the days of the "Solid South," the appearance of the word Republican after a candidate's name would sound the death knell for his candidacy. Despite this practical effect, no court has ever suggested that such ballot information is unconstitutional.

placing them in an exalted status above all other provisions of the Constitution. This simply cannot be. Rather, when evaluating the second element of the *Thornton* test, the Court should distinguish between the purpose of the people's action, amending the Constitution, and the purpose of their desired amendment, creating a new qualification for service in Congress. Any other reading of this element ignores the Court's careful use of the word "sole" in this portion of the test. 514 U.S. at 836.

Further, the Eighth Circuit erred by utterly ignoring the Constitution's affirmative grant of power to the states. The Constitution grants states "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (*quoting Tashjian*, 479 U.S. at 217). Article VIII merely regulates the manner in which elections are held by disclosing information about congressional candidates. The Constitution contains no prohibition on this activity.[39] Hence, the Constitution's default provision, art. I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 69 (1997).

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[39] The Constitution does prohibit the inclusion of some information on the ballot. *See Anderson v. Martin*, 375 U.S. 399 (1964). In *Anderson*, the Court held that it was a violation of the Equal Protection Clause for the state of Louisiana to identify the race of a candidate on the ballot because, by identifying race, Louisiana was encouraging its citizens to cast their ballot on the basis of race. *Id.* at 402-04. And the Equal Protection Clause prohibits the state from doing by proxy that which it could not do by direct means, *i.e.*, exclude candidates from elective office on the basis of race. *Id.* The present case presents no analogous equal protection issue.

The Eighth Circuit's failure to recognize that Missourians possessed the right to control their ballot was in error. That failure deprived the people of their voice in government and took from the people an opportunity to control their own government.

III. The people of Missouri do not violate the First Amendment by simply commenting on the behavior of congressional candidates.

The Eighth Circuit attempted to resolve Gralike's free speech claim by treating it as if it presented a compelled speech case. This attempt to pigeonhole Article VIII is inconsistent with this Court's precedents. First, in a compelled speech case, the state law at issue must actually compel speech. No compulsion is present in Article VIII. Further, Article VIII does not attempt to regulate a congressional candidate's speech. Rather, the public informs the voters about the candidate's behavior.

Even if the Court were to conclude that a candidate's speech was indirectly affected by Article VIII, this Court's election law precedents dictate that the candidate's rights must be balanced against the interest the public seeks to promote. The Eighth Circuit utterly failed to perform any sort of balancing test. Properly balanced, the people's right to comment on the behavior of candidates for federal office outweighs a candidate's right to silence the people.

A. Article VIII does not abridge a candidate's free speech rights because it does not compel speech.

The Eighth Circuit began with the premise that the placement of ballot information adjacent to a candidate's name impermissibly compels speech. The court of appeals principally relied on *Wooley v. Maynard*, 430 U.S. 705 (1977) and *Miami Herald Pub. Co., v. Tornillo*, 418 U.S. 241 (1974), which address the proposition that the government may not compel someone to speak. *Gralike*, 191 F.3d at 917-919 (P.A. A6-11). Concededly, the Court did find compelled speech to be unconstitutional in *Wooley* and *Tornillo*, but the cases are inapplicable to an analysis of Article VIII because it does not compel any speech. Under Article VIII, the people simply comment on the behavior of their congressional candidates. The people's communication is neither a punishment nor a penalty.[40] It is only an observation.

In *Wooley*, the issue was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," *i.e.*, whether the vehicle's owner can be required to operate a "'mobile billboard' for the State's ideological message." 430 U.S. at 713, 715. The Court held that the message, "Live Free or Die," was speech, and that the Maynards were impermissibly compelled to publish that

[40] In its First Amendment analysis, the Eighth Circuit committed the same error that was prevalent throughout its opinion. The court assumed that the ballot information would be some sort of punishment, and it conceded the assumption by describing the punishment not as "actual," but merely as "potential political damage." *Gralike*, 191 F.3d at 918 (P.A. A9). Because the record contains no evidence on this point, it is unclear what effect the ballot information would have on any election.

message.[41]

The Court in *Wooley* relied on two prior cases in which someone was required to deliver a message against their will: *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The Court held that requiring the Maynards to bear the state's message on their license plate was speech by the Maynards, compelled in the same fashion as the speech in *Tornillo* (where the Court "held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized") and *Barnette* (where the Court was "faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures"). 430 U.S. at 714. The Eighth Circuit also cited two post-*Wooley* cases, but both fit the *Wooley* model. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 786 (1988), the Court considered a requirement that professional fund raisers disclose certain information "prior to any appeal for funds." And in *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1, 4 (1986), the state "require[d] a privately owned utility to include in its billing envelopes speech of a third party with which the utility disagrees."

In each of these cases, the state was dictating the

[41] The dissent in *Wooley* questioned that conclusion: "The State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture." 430 U.S. at 720 (Rehnquist, J. dissenting).

message, then requiring the plaintiffs to deliver it.[42] That is not true here. The message here is the people's, and they have directed the Secretary of State to disseminate it. Though the message will be adjacent to the name of a candidate, nothing in its placement or content suggests that the message is the candidate's own. To the contrary, the law itself and the required phrasing of the public's message indicate that it has an origin other than the candidate. Thus, *Wooley* and the other "compelled speech" cases relied upon by the Eighth Circuit are inapposite.

B. Article VIII does not abridge a candidate's free speech rights because the candidate remains free to speak or remain silent; the people simply comment on the candidate's behavior.

In amending their constitution, the people of Missouri require the Secretary of State to monitor the actions of congressional candidates and report, in shorthand form, on those actions. Thus, the people place ballot information next to the name of an incumbent candidate who fails to engage in any one of eight specified behaviors. Mo. Const. art. VIII, § 17(2). The people do not compel the performance of any of the eight behaviors. They just insist on knowing whether they were actually performed.

Surely it does not present a constitutional problem to

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[42] For example, in *Wooley*, the state compelled the speech by using the threat of criminal punishment. 430 U.S. at 707-08. And in *Tornillo*, the state compelled the speech using the threat of civil penalty. 418 U.S. at 244.

comment on someone's actions. This is all the people do under Article VIII. The focus is completely upon the behavior of congressional candidates. If an incumbent candidate delivers speech after speech against term limits on the floor of the house, she will not receive the ballot notation if she acts as the people wish.[43] If an incumbent candidate denigrates term limits in advertisements, she will not receive the ballot notation if she acted as the people wish. In fact, if the incumbent candidate goes so far as to actually lobby her congressional colleagues to vote against Missouri's proposed term limits amendment, she still will not receive the ballot notation if she acted as the people wish. Thus, Article VIII only provides for a comment on behavior, not on speech. And this Court has never held a simple comment on the behavior of another to be a violation of the Constitution.

The situation is much the same for non-incumbent candidates. Pursuant to Article VIII, § 18, non-incumbent candidates are provided an opportunity to take a pledge, with any failure to take the pledge noted on the ballot. The focus of the public's message is, once again, on whether the candidate takes the pledge, not what a candidate may say about term limits. The non-incumbent is free to decry the concept of term

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[43] Accordingly, Senators and Representatives will have ample opportunity to disassociate themselves from their actions. Because of the opportunity for disassociation, any possible burden Article VIII places on their free speech rights is, at best, slight. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (because shopping center owner had an opportunity to disassociate himself from pamphleteers' speech, his First Amendment rights were not violated when the State of California forced him to allow pamphleteers to use his property); *see also Wooley*, 430 U.S. at 722 (Rehnquest, J., dissenting) (because plaintiff had an opportunity to disassociate himself from the New Hampshire state motto, New Hampshire was not guilty of unconstitutionally compelling speech).

limits and the pledge itself; the people simply need to know whether the candidate took the pledge. The candidate remains free to speak or keep silent as he chooses; the people of Missouri simply need to be informed about the candidate's behavior.

To the extent that the people's message regarding the candidate's behavior is considered a comment on silence, this Court has repeatedly held that it is appropriate to comment on another's silence, and even draw an inference from another's silence in a non-criminal context. *See e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 286-87 (1998); *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976). Insofar as Article VIII, § 18 applies to non-incumbents, that is all that occurs. The people comment on the candidate's failure to take a pledge to support a term limits amendment. Mo. Const. art. VIII, § 18. They do not require the candidate to take the pledge; they simply observe that the candidate did not take the pledge.[44] This is constitutionally sound.

By its opinion, the Eighth Circuit used the Free Speech Clause to silence the public's speech and frustrated the purposes of the First Amendment. It transformed congressional candidates from a group of individuals subject to public commentary into a cloistered oligarchy in which the exalted elected officials may behave as they see fit, but the simple people may make no comment. Thus, the court of appeals opinion undercuts the very essence of the First Amendment:

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[44] The court of appeals suggested that it was Missouri's Secretary of State who was making the observation. *Gralike*, 191 F.3d at 920 (P.A. A12). Though this may be technically correct, it is misleading. As discussed more fully in section IV, the people have told the Secretary when she must place the information on the ballot; she is afforded no discretion.

the right of the people to discuss their own government. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitution protects the right to receive information and ideas); *see also Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966) (the major purpose of the First Amendment was to protect the free discussion "of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."). This Court should restore to the people their First Amendment freedoms.

C. Even if Article VIII has a slight impact on candidate speech, that impact cannot outweigh the overwhelming interest of Missourians in communicating with and receiving information about their public officials.

The Eighth Circuit failed to recognize that even in "compelled speech" cases, the requirement that a plaintiff express government-mandated words is not automatically unconstitutional; it is subject to a balancing test. *See Wooley*, 430 U.S. at 716 ("We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates."). Further, this Court made clear in *Timmons* what had long been true: that there is no one test for determining whether an election law affecting speech violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). *See also, Nixon v. Shrink Missouri Government PAC*, ____U.S.___, 120 S.Ct. 897, 903 (2000) (declining to apply a label that encompasses "[p]recision about the relative rigor of

the standard" to be applied). But one thing is clear: the essence of the analysis is the balancing of the burden the election law places on the plaintiff's rights against the nature of the government's interests. *Timmons*, 520 U.S. at 358-59.

Here, the Eighth Circuit committed the same error it committed in *Timmons* itself: it simply chose a label (here, "compelled speech"), invoked another label (here, "strict scrutiny"), and then jumped to the conclusion that "strict scrutiny" is "scrutiny that is strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring). For example, in footnote 8 of its opinion, the court of appeals claimed that under *Burdick* strict scrutiny would apply because Article VIII is a content-based and viewpoint-based speech restriction. *Gralike*, 191 F.3d at 920, n. 8 (P.A. A12). But the Eighth Circuit failed to recognize that even in *Burdick*, this Court demanded balancing: it held that a court, when determining the constitutionality of an election law, should look to the "character and magnitude" of the restriction on speech and not its classification. 504 U.S. at 434 (citation omitted). And, as the Court has indicated more recently, "where constitutionally protected interests lie on both sides of the legal equation . . . there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'" *Nixon*, 120 S.Ct. at 911 (Breyer, J., concurring). The "content-based" and "viewpoint-based" labels, in the sense used by the Eighth Circuit, would apply in essentially all of the election-speech cases. But none of these cases suggest that labeling substitutes for analysis or permits a court to avoid the balancing requirement.[45]

[45] Not only did the Eighth Circuit fail to balance the competing interests at issue, it decided this case as if the plaintiffs bore no burden to show that their freedom of speech was even being infringed. But this Court has noted that, "[a]lthough it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Article VIII, if it places any burden at all, places only a slight burden on the free speech rights of candidates for Congress. Candidates can decry the evils of term limits in speech after speech without incurring any comment from the people of Missouri. Contrarily, candidates can campaign without uttering a word about term limits and the people would not place ballot information next to their names. The only two things that would cause the people to place ballot information next to a candidate's name are: the incumbent candidate's behavior in Congress and the non-incumbent candidate's behavior in failing to sign the pledge. Thus, the people comment on only the narrowest range of activities, and the magnitude of any possible restriction on speech created by Article VIII is, at most, small.

Further, a congressional candidate's opportunity to disassociate herself from these actions further decreases the magnitude of any impermissible limitation on speech. While the candidate performs the activities in Article VIII, she is free to explain that she is only acting as the people requested, or that she actually believes term limits to be an abysmal idea. In fact, the candidate may decry term limits loudly and longly. Because of this opportunity for disassociation, the magnitude of any possible burden on candidates' free speech rights is further diminished. *See PruneYard*, 447 U.S. at 87; *Wooley*, 430 U.S. at 722 (Rehnquest, J., dissenting).

On the other side of the balance, the people have a

strong interest in preserving Article VIII. Initially, their interest may be found in the Constitution itself. Article I, § 4 of the Constitution grants to the states the power to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives."[46] In passing Article VIII, the people were only regulating the manner in which elections would be held by deciding what information would appear on the ballot. Thus, they were acting in accordance with their constitutional mandate.

Further, the people have a fundamental interest in preserving their voice in government. By passing Article VIII, the people of Missouri announced to the world that they wanted the Constitution amended. They spoke as one, as the body politic itself, and not as a collection of diffuse individuals. This voice of the people must be heard to ensure the integrity of our government because "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *Thornton*, 514 U.S. at 843 (Kennedy, J., concurring) *quoting Hague v. Committee for Industrial Organization*, 307 U.S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C.J.). For a government is only valid if it responds to the will of the people. By passing Article VIII, the people simply voiced their will. And preserving the people's voice in government is not only an important interest;

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[46] Concededly, Article I, § 4 allows only the legislature to prescribe the time, place, and manner of election and not the people. But in the area of election laws, the Court has rejected any distinction between the state's legislature and the state's populace. *See Davis v. Hildebrandt*, 241 U.S. 565, 568 (1916) (the people of the states, by use of referendum, may regulate the time, place and manner of holding congressional elections).

it is a paramount interest. Nothing in the Constitution compels the federal courts to deprive Missouri's electorate of their free speech rights.

Additionally, the people have the right to provide (*i.e.*, speak) and the right to receive information. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian*, 479 U.S. at 220. In fact, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). *See also Tashjian*, 479 U.S. at 220 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."), *quoting Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983); *Stanley*, 394 U.S. at 564 (Constitution protects rights to receive information and ideas); *Mills*, 384 U.S. at 218-19 (the major purpose of the First Amendment was to protect the free discussion "of governmental affairs, which includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes").

The right to receive information and the other closely related concerns identified above are critically related to the people's involvement in government. Such involvement is an essential element of democracy. In this day of public disengagement from the electoral process, measures enacted at the behest of the people through the initiative process present a great opportunity to once again engage the public in the

business of government by empowering the people to articulate what is critically important to them. Additionally, giving the public the means to evaluate the respect politicians accord their determination encourages further public participation in the process and combats the detachment prevalent in our political process. Thus, Article VIII not only furthers an interest in an informed electorate, it presents a very real opportunity to reestablish the vital link between the governed and their representatives – to engage on a broad scale in the "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. No interest could be more compelling. Therefore, the people's interest in passing Article VIII outweighs any possible effect Article VIII may have on the free speech rights of candidates for Congress.

D. Article VIII is narrowly tailored to advance the people's compelling interests.

The Eighth Circuit concluded that Article VIII is not "narrowly tailored to achieve even the more limited goal of informing voters of candidates' views on term limits." *Gralike*, 191 F.3d at 921 (P.A. A14). That statement relies on an incorrect factual premise: Missourians did not have the generalized goal of informing voters of candidates' views on term limits – Missourians want to know how their congressional candidates behaved in regard to a particular proposed constitutional amendment, not what they generally think about term limits. But the Eighth Circuit's statement also embodies a legal error. Similar to the labeling "analysis" criticized above, the circuit court speaks of "narrow tailoring" as if it were a precise test that could be measured with a tailor's

tape. In fact, the extent to which a particular regulation must be "tailored" to advance government interests depends on the balancing test described above.

In light of the interests discussed above, Article VIII is narrowly tailored; it does nothing more than is necessary to effectively and efficiently achieve its compelling goals. Article VIII provides the public with the information they requested and it utilizes the public's voice to communicate that information, thereby engaging the public in their government. The people wanted Congress to pass a particular Constitutional amendment regarding term limits and they told congressional candidates precisely what they wanted the amendment to be. The electorate wanted to know which congressional candidates either declined to pledge to behave so as to advance this particular measure or failed to act in certain specified ways to bring about its enactment. This is precisely what the electorate is to be told.[47] No more, no less. And the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Article VIII advances these interests and it does so with precision.

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[47] The Eighth Circuit criticizes Article VIII because it only provides information on those candidates whose behavior fails to demonstrate support of the public's desired outcome. *Gralike*, 191 F.3d at 918 (P.A. A9). Nothing could be more narrowly tailored. Missourians do not wish to reward political candidates for following the people's instructions; such could be viewed as an inappropriate public endorsement on the basis of only one issue. Rather, the people simply need understandable information about the behavior of candidates not favorably disposed to their desired outcome so that they can evaluate this behavior in light of other information they have about such candidates.

Public disillusionment with a government that is perceived by many to be unresponsive to the will of the governed is an epidemic that literally threatens our participatory democracy. Article VIII provides an answer, allowing the people to speak with a clear voice and further permitting them to perform a ready evaluation of otherwise indiscernible candidate behavior. Thus, Article VIII serves the compelling interest of combating voter disillusionment and is narrowly tailored to truly allow the voters to accomplish that objective. Measures like Article VIII could reinvigorate American democracy by once again empowering the electorate and thereby engaging the public in our democratic process. There can be no higher public interest.

IV. The Speech and Debate Clause does not insulate public officials from the will of their constituents.

In its opinion, the Eighth Circuit held that the people violate the Speech and Debate Clause of the Constitution[48] when they comment on the actions of their own elected officials. *Gralike*, 191 F.3d at 921-922 (P.A. A14-15). That holding breaks new ground, carrying the Speech and Debate Clause so far beyond its historical and logical bounds that it interferes with representative democracy.

Contrary to the Eighth Circuit's view, the Speech and Debate Clause is merely a "legislative privilege, protecting against possible prosecution by an unfriendly executive and

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[48] The provision provides that Senators and Representatives "shall not be questioned in any other place" for "any Speech or Debate in either House." U.S. Const. art. I, § 6.

conviction by a hostile judiciary." *U.S. v. Johnson*, 383 U.S. 169, 179 (1966). Thus, the clause serves to ensure the independence of the legislature by preventing executive and judicial intrusion into the legislative process. The Court reaffirmed this principle in *Gravel v. United States*, noting that the fundamental purpose of the Clause was to free "the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." 408 U.S. 606, 618 (1972).

The privilege created by the Speech and Debate Clause was not intended to foreclose comment by the voters on the legislative process. Nor was the Clause ever intended to shield legislators from the electoral judgment of the governed. Indeed, quite contrary to the Eighth Circuit's holding, the system of electoral representation established by our Constitution forces "Senators and Representatives to speak and vote" while facing the threat of electoral "retribution." *See Gralike*, 191 F.3d at 922 (P.A. A15). Allowing the people to provide and receive information about their legislators' performance may enhance the possibility of retribution, but not in any way that the Speech and Debate Clause prohibits.

The Eighth Circuit implicitly conceded the absence of precedential or historical support for its holding by selectively quoting words from *Gravel* to give the holding a wholly new meaning. The court of appeals claimed that this Court wrote, "'[T]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats . . . that directly impinge upon or threaten the legislative process.'" *Gralike*, 191 F.3d at 922 (P.A. A15), *quoting Gravel*, 408 U.S. at 616. Though this citation seems to support the Eighth

Circuit's conclusion, the complete quotation does not. *Gravel* actually states, "[T]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats *from the Executive Branch*. It thus protects Members *against prosecutions* that directly impinge upon or threaten the legislative process." *Id.* at 616 (emphasis added).[49] The complete quotation reinforces the idea that the Speech and Debate Clause was designed to protect the members of Congress from the coordinate branches of government and not from their own constituents. *See also, U.S. v. Helstoski*, 442 U.S. 477, 488 (1979) ("the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts").

The information placed on the ballot by Missourians pursuant to the terms of Article VIII is not the constitutional equivalent of a prohibited criminal or civil prosecution or feared executive action.[50] It is, rather, protected public commentary on

[49] The underline indicates the portion of this Court's language the Eighth Circuit omitted from its rendition of this Court's holding. *Gralike*, 191 F.3d at 922 (P.A. A15).

[50] While the Eighth Circuit was correct in noting that Article VIII did involve some executive action, the executive action is merely ministerial. The Secretary of State physically places the information on the ballot. But there can be no serious dispute that it is the people who have directed that it be done and that the Secretary must follow specific instructions when placing the information on the ballot. She places ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of the criteria specifically outlined in Article VIII, § 17(2)(a-g); and next to a non-incumbent candidate's name if, and only if, the candidate refuses to take the pledge set forth in Article VIII, § 18. The Secretary has no discretion in either case. *See also In re Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. 1994) (the vast majority of the duties assumed by the Missouri Secretary of State are ministerial, especially in the area of elections).

the behavior of congressional candidates. And the Speech and Debate Clause was never intended to insulate politicians from political consequences imposed by their constituents.

CONCLUSION

Petitioner respectfully requests this Court to reverse judgment of the United States Court of Appeals for the Eighth Circuit and to render judgment for Petitioner.

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